Proudly Political

By JOHN DENVIR*

OVER FORTY YEARS ago Professor Herbert Wechsler of Columbia Law School used the pages of the Harvard Law Review to lob a bombshell into the debates about the role of the Supreme Court in American democracy. Wechsler argued that courts, unlike legislatures, were not democratic institutions; therefore, only the submission of the courts to proper legal method could justify judicial review: "I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[1]

Wechsler's "neutral principle" thesis argued that while democratically responsible—that is, elected—branches of government might properly rely on a particularistic form or reasoning, judges should only apply general principles which they were willing to apply neutrally across the board to large batches of cases.

The Warren Court was a target of Wechsler's thesis;[2] he made clear that he did not believe that the Warren Court's activism in cases like *Brown v. Board of Education*[3] met the "neutral principles" test. It is true that the Wechsler concept of judging proved difficult for an activist court. The Warren Court wanted to involve itself in political controversies like racial discrimination, reapportionment, and freedom of speech, but intelligent judicial activism in these and other areas seemed to require just the sort of particularistic legal reasoning which Wechsler forbade. For an activist judge, following the "neutral principle" thesis was a little like playing the piano while wearing gloves; it can be done, but not well.

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1. Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

2. *See id.* at 31–35.

3. 347 U.S. 483 (1954).

Alexander Bickel quickly supplied Wechsler's critique of activism a catch phrase, "the counter-majoritarian difficulty"[4] and it has haunted discussions of liberal judicial activism ever since.[5] Ronald Dworkin did make a valiant effort to reconcile activism and principle in his book *Law's Empire*.[6] But Dworkin's solution endorsed an interpretive method which had a super judge named Hercules employing a sliding scale of factors like institutional "fit" and "political morality" which did not seem to possess the rigor Wechsler demanded.[7] Not only did the Herculean method appear easy to manipulate to predetermined political ends, it was also faced backwards toward precedent in a way which appeared insensitive to the primary role of fact and policy in good judging.

Whether a method of judging exists that is both politically legitimate and pragmatically effective is an important issue for American democracy. Intelligently deciding a difficult case under our Constitution with its copious use of maddeningly abstract terms seems to require a political element which no legal methodology can control. The implication of the "neutral principle" and "counter-majoritarian difficulty" critiques is that the Supreme Court must choose between activism and legitimacy.

Now, Christopher Eisgruber's important new book[8] suggests that perhaps the "counter-majoritarian difficulty" itself is a chimera. He dissolves the tension between political efficacy and democratic legitimacy by arguing that the Supreme Court is an essential part of our constitutional structure *because* of its political nature.[9] The Court is not less democratic than Congress or the Presidency; it is just democratic in a different way.

Eisgruber points out that defenders of judicial review have unnecessarily abandoned the moral high ground by conceding the democratic deviance of the Supreme Court. The Wechsler-Bickel position adopts too narrow a conception of democracy, one which misidentifies self-government with electoral politics. Eisgruber argues that a better understanding of "democracy" shows that in resolving certain

4. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AND THE BAR OF POLITICS 16 (1962).

5. For reasons that escape me, conservative judicial activism seems immune to the counter-majoritarian difficulty.

6. *See* RONALD DWORKIN, LAW'S EMPIRE (1986).

7. *Id.* at 225–50.

8. *See* CHRISTOPHER EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001).

9. *See id.* at 48.

issues, judges can claim a democratic pedigree superior to that of elected officials.

Eisgruber's argument relies on a distinction between long term values and short term interests; he believes that most citizens would agree that on some issues of political morality—he uses the example of the abortion controversy[10]—values should trump interests. Moreover, because appointment of justices for life makes judges more "disinterested" than elected politicians, judges are better situated to engage in a dialogue about values than elected officials who are more likely to be unduly influenced by short term political interests.[11]

And while judges are more insulated from short term political calculations than elected officials, the Court itself is made politically responsive in the long term by means of the appointment power.[12] Justices of the Supreme Court are appointed by an elected official, the President, and confirmed by other elected officials, the Senate. And no institutional fact has been more conclusively demonstrated in the forty plus years since Wechsler wrote than that over the long term Supreme Court decisions tend to reflect the values of the national political majority.

And judicial review promotes democracy in another way. Rather than shutting down the democratic process, judicial decisions, especially unpopular ones, act as a catalyst encouraging a far ranging political debate about constitutional values which eventually influences later Supreme Court decisions.[13]

For most of his book, Eisgruber seems to be calling for the Supreme Court to engage in a free, wide ranging, pragmatic colloquy about issues of political morality in American society. The Court operates as a forum of higher politics, a political institution which can be both democratic and effective.

But in the last quarter of the book, Eisgruber changes intellectual directions, cutting back substantially on his endorsement of judicial activism. His more restricted view seems motivated by concerns of judicial overreaching, which are usually illustrated by the case of *Lochner v. New York*.[14] *Lochner* was an early twentieth century decision in which the Supreme Court struck down a New York labor law, which limited to ten the number of hours a baker could work on any one day. Every-

10. *See id.* at 54.
11. *See id.* at 58–59.
12. *See id.* at 64.
13. *See id.* at 96.
14. 198 U.S. 45 (1905).

one seems to agree that the Supreme Court was wrong to invalidate the New York law; it was what we would now call a routine "wages and hours" law. But, as Eisgruber points out, the conventional wisdom is that *Lochner* was "not merely wrong but illegitimate."[15] It is seen as a classic example of the Supreme Court not respecting certain basic limits on judicial review.

Therefore, it is important to Eisgruber to determine where the Court went wrong in *Lochner*. He decides the error was to rely on broad principles. He argues that in *Lochner* the Supreme Court went beyond deciding a narrow issue like whether or not workers have a right to enter into labor contracts to consider larger issues like whether the statute operated in the context of a "fair and well-functioning marketplace."[16] Eisgruber points out that this latter question is "radically expansive in scope"[17] and requires the Court to take into account almost all labor, property and tax law. So Eisgruber believes the lesson *Lochner* teaches us is that "the inevitable generality of claims related to social welfare renders economic rights an inhospitable domain for judicial intervention."[18]

Eisgruber then transplants the lesson of *Lochner* to his more general theory of judicial review. He concludes that while it is permissible for courts to use "discrete" moral principles in deciding cases, they should eschew the use of "comprehensive principles."[19]

He describes "discrete" principles as "particular side restraints on governance"[20] and uses examples to make his point. One example he gives is the free speech principle that "government should never mandate segregation along lines of race or religion."[21] Eisgruber believes that a good example of a "comprehensive principle" is the one the Supreme Court implicitly relied on in *Lochner*—workers have a right to contract for long hours in the context of a fair and well functioning marketplace.

I must confess I find the discrete/comprehensive distinction the least persuasive part of Eisgruber's book. In contrast to the exhaustive analysis he gives to the issue of the democratic nature of judicial review earlier in the book, here he spends little time explaining or justifying the distinction. Instead he gives examples from case law,

15. EISGRUBER, *supra* note 8, at 162.
16. *Id.* at 164–65.
17. *Id.* at 165.
18. *Id.*
19. *Id.* at 166.
20. *Id.* at 170.
21. *Id.*

showing cases where the Court either properly relied on a discrete principle or properly rejected a comprehensive one.

For instance, he sees the case of *New York Times v. Sullivan*[22] as a classic use of a permissible discrete principle. Here the side constraint was the principle that "the government must not penalize persons for criticizing its officials or policies."[23] But he then candidly admits in a footnote that "*Sullivan* might be also defended on the basis of a comprehensive principle such as 'the government is obliged to facilitate robust and open debate.'"[24] This would appear to put *Sullivan* in the impermissible *Lochner* category.

He then uses the case of *Timmons v. Twin Cities Area New Party*[25] to illustrate how the Court should reject reliance on a forbidden comprehensive principle. *Timmons* involved a Minnesota law forbidding "fusion candidates," the appearance of one candidate on the ballot as the nominee of more than one party. Third parties benefit from "fusion" candidacy by identifying their party with a well-known candidate of a major party; the major party candidate benefits from the third party votes. But some feel that fusion candidates undermine the two party system which they believe is essential to American democracy.

The Supreme Court upheld the anti-fusion candidate law in *Timmons* and Eisgruber thinks they were right to do so because to resolve the issue of whether fusion candidacies promote or undermine democracy would require the Court to make a "comprehensive judgment about the fairness of the political system as a whole."[26] This would entail more than application of a discrete side restraint, it would, like *Lochner*, involve use of a comprehensive principle beyond the Court's competence.

But *Timmons*, no less than *Sullivan*, can be recast as requiring no more than the application of a discrete side restraint—the First Amendment right of political association does not allow state legislatures to tell political parties with whom they can associate. Under this reading, *Timmons* becomes a proper occasion for judicial intervention.

And even if we accept Eisgruber's assessment of *Timmons* as involving a comprehensive principle, there is always the question of comparative competence. Even if we believe courts are not the ideal forum to determine comprehensive issues like what form of election

22. 376 U.S. 254 (1964).
23. EISGRUBER, *supra* note 8, at 172.
24. *Id.* at 243, n.7.
25. 520 U.S. 351 (1997).
26. EISGRUBER, *supra* note 8, at 172.

better fosters democracy, their disinterestedness would seem to give them a leg up on a legislature controlled by major parties dedicated to shutting down the growth of minority parties. Once again Eisgruber candidly admits that many experts think that courts are fully competent to handle cases like *Timmons*.[27]

In the end, Eisgruber himself does not seem completely comfortable with the distinction.[28] He merely offers it to those readers who find it helpful. I think that few will accept his offer until he finds some way to reduce its apparent malleability.

I myself would suggest that he abandon the discrete/comprehensive distinction as unnecessary to his larger theory. Once we credit Eisgruber's original insight that the justification for judicial review is political rather than legal, there is no need to have categorical limits on when the Court can intervene. In fact, the *Lochner* experience supports rather than challenges Eisgruber's theory; it illustrates how the Appointments Power acts as an effective political control on the Supreme Court.

As I would tell the story, the baker plaintiffs in *Lochner* could claim that the New York law limiting their hours to ten per day or sixty per week interfered with their "opportunity to earn a living." The opportunity to earn a living is a "fundamental right" and deserves some judicial protection.[29] But constitutional rights are never absolute; we have to "balance" the interference with the protected right against the state interest furthered by the law. In *Lochner*, the interference was only partial and the state interest in ensuring that employers did not use market leverage to depress overall wages was very strong. The Court should have upheld the law.

So the Supreme Court got the balance wrong; courts, like legislatures, will do that on occasion. But the *Lochner* decision provoked just the sort of lively political debate Eisgruber says a controversial decision should. And eventually there was a happy ending. About thirty years later, a new national political coalition took control of the overtly political branches of government. Not too long thereafter, by

27. *See id.* at 175.

28. "I am offering a third choice—but it will be of little interest to readers who think the strategic judgments in *Sullivan* too adventuresome, or who are confident that the Court can make the judgments necessary to dispose of *Timmons*." EISGRUBER, *supra* note 8, at 175.

29. *See* JOHN DENVIR, DEMOCRACY'S CONSTITUTION: CLAIMING THE PRIVILEGES OF AMERICAN CITIZENSHIP (2001).

means of the Appointment Power, a new majority took control of the Court. *Lochner* was quickly overruled.[30]

Ever since *Marbury v. Madison*[31] there has been a tension in the American constitutional project over whether the Supreme Court plays a legal or a political role. I think Eisgruber's insight now allows us to admit that although Article III speaks in "legal" form, the history of the Court has been one of deciding political issues. Therefore, instead of attempting to put categorical restraints on the Court, I would suggest that we should attempt to develop reforms which will help it better perform its essential democratic function.

I think we should consider three reforms. First, I think we might start appointing some nonlawyers to the Court. If we admit that the Court plays a political rather than a legal function, then there is no reason to limit its membership to a profession which constitutes such a miniscule percentage of the population. The French Conseil D'Etat routinely has nonlawyer members.[32] A Supreme Court made up entirely of lawyers sends the wrong signal to the citizenry at large; it tells them that constitutional law involves technical issues on which they should have no view. This leads to a citizen passivity which is just the opposite of what our constitutional culture needs.

A second reform would require a constitutional amendment. It would replace our current system's granting of life tenure to Supreme Court justices with a provision for long, nonrenewable terms for Supreme Court justices.[33] Here, the trick is to preserve independence and "disinterestedness" while improving responsiveness. The members of the German Constitutional Court serve nonrenewable terms of twelve years.[34] I would suggest an amendment which limited appointment to citizens over the age of fifty and permitted them a nonrenewable term of fifteen years. My idea would be to create a pool of candidates who have an intellectual and political history open to public scrutiny and to ensure as far as possible that the Supreme Court be the last public office that a justice would hold.

If we combine the addition of nonlawyers with the reform of a long nonrenewable term, we start to create a court of high politics that can claim a broader democratic pedigree than the current Su-

30. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

31. 5 U.S. (1 Cranch) 137 (1803).

32. *See* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 490 (1999).

33. This would also require the creation of a national court of appeals to handle the nonconstitutional matters now on the Supreme Court's docket.

34. *See id.*

preme Court and will possess greater sensitivity to the current political aspirations of the American people. I can see judges still being appointed to the court, but also politicians and scholars—anyone who could convince the President and Senate that he or she would be a good judge of the proper application of the principles of the American political tradition to current controversies. Two examples of exemplary nonlawyer justices who come to my mind are former President Jimmy Carter and historian Garry Wills. Perhaps conservatives would prefer a Justice (George) Will to a Justice Gerry Wills.

The third reform has to do with the form of constitutional discourse. Wechsler's "neutral principle" requirement argued that only rigorous legal method could compensate for the Court's democratic deficit. But if we admit that the Supreme Court plays a political function, then there is no need for a narrowly legal form of reasoning. The Court could adopt a looser, but no less rational, form of discourse.[35]

Stare decisis would play a less prominent role in decisions. Justices should use a variety of resources in deciding a difficult question of constitutional law, but squaring it with an allegedly similar case decided one hundred years earlier is probably not one of them. This does not mean that prior cases are unimportant as indications of how the American political tradition felt about similar controversies in the past, but no longer would citation of precedent substitute for analysis of how alternative decisions would reflect our best political traditions and impact the daily lives of citizens. We should also expand the constitutional canon beyond American cases to consider comparative materials as well as literature and film as they reflect national values.[36] Often, particularistic balancing tests will be the only effective way to set out and evaluate all the relevant material. Opinions would read more like well-written essays in our best journals of opinions than oracular pronouncements issued from the heavens.

As now, the Court's decisions would be controversial, but more than now, they would be transparent. I see this new form of discourse as more a change in form than substance because no one seriously doubts that current Supreme Court decisions are more determined by the political values and factual assumptions of individual justices than

35. I resist the adjective "pragmatic" only because its meaning has become so controversial, but I think on this issue the conservative Richard Posner seems to get the better of the liberal Ronald Dworkin. *See* Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 3533 (1997); Richard A. Posner, *Conceptions of Legal Theory: A Response to Ronald Dworkin*, 29 ARIZ. ST. L.J. 377; Ronald Dworkin, *Reply*, 29 ARIZ. ST. L.J. 432 (1997).

36. *See* John Denvir, *Capra's Constitution*, *in* JOHN DENVIR, LEGAL REELISM: MOVIES AS LEGAL TEXTS 1222–53 (1996).

conformity to precedent. But the change in form would have a beneficial effect on overall constitutional discourse because nonlawyers would then see themselves as competent to assess the Court's work in a way that an opinion's formal reliance on the mysterious science of law forbids.

I can see both nightmare and dream scenarios coming out of my attempt to stretch Eisgruber's theory to create an overtly political constitutional court. The nightmare would be that the Supreme Court will evolve from a covert court of higher politics into an overt court of lower politics, individual justices acting only as agents of the political parties that supported their appointment. But, as *Bush v. Gore*[37] reminds us, such partisanship is a danger whether or not we candidly admit the Supreme Court plays a political function.

And while I do not discount the possibility of an overtly political Supreme Court becoming overtly partisan, I personally believe that the Court will continue to transcend partisanship in all but the most exceptional cases. I am encouraged in this belief by my experience in putting together a list of "greatest" modern justices. Although a social democrat in politics, I found my list of "great" Justices (Warren, Brennan, Blackmun, Stevens, and Souter) had all been appointed by Republican presidents.

On the other hand, there is the dream that a formally political Court would be the capstone on the institutional edifice of a democratically legitimate system of government. But this dream is unattainable until we face up to the scandal of how money dominates American politics. Presently, Supreme Court justices have the same low democratic pedigree as the elected officials who appoint and confirm them.

But if we—courts, legislatures, citizens—can ever create a political system in which all citizens have a voice that is heard and a vote that counts, then the Supreme Court might become an important player in fulfilling the dream which Professor Eisgruber calls in the title of his excellent book "constitutional self-government."

37. 531 U.S. 98 (2000).